In the Supreme Court of the United States

October Term 1952

The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver,
Petitioners,
vs.
The Western Pacific Railroad Company, et al.,
Respondents.

No. 150

Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc.,
Petitioners,
vs.
The Western Pacific Railroad Company, et al.,
Respondents.

No. 160

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondents in Opposition

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OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of California, Southern Division (R. 258), is reported at 85 F. Supp. 868. The opinions in the United States Court of Appeals for the Ninth Circuit (R. 2214, 2239) have not yet been reported. On July 9, 1952 the Court of Appeals rendered an opinion in banc in this case, one Judge dissenting, respecting its practice on rehearings in banc. The opinion and dissent are printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered October 29, 1951 (R. 2255). The order of that Court denying the petitions for rehearing and striking them, in so far as they sought rehearing in banc, was entered January 30, 1952 (R. 2259). The petitions for a writ of certiorari were filed on June 23 and June 26, 1952, the time having been extended by order of Mr. Justice Douglas. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does a holding company, whose stock interest in an operating railroad company has been lost by judicial decree confirming a plan for reorganizing the railroad company, have a right in equity to be paid, at the expense of unpaid secured creditors of such subsidiary, for the reduction of the taxes of the reorganization trustees of the railroad company resulting from the entry of the holding company's loss as a deduction in consolidated federal income tax returns, in repudiation of the holding company's own practice in tax dealings with its former subsidiary, and notwithstanding that the holding company suffered no loss or damage through the entry of its loss in the tax returns?

2. Has such claim of the holding company been lost through failure to present it to the bankruptcy court in the course of the reorganization proceeding?

3. Has a Court of Appeals acted within its powers by denying a petition for rehearing and ordering that the petition, in so far as it sought rehearing in banc, be stricken as "being without authority in law or in the rules or practices of this court"?

STATUTES INVOLVED

1. The consolidated returns were filed under Section 141 of the Internal Revenue Code. The stock loss deduction is authorized in Section 23(g)(4) of the Code, enacted in October, 1942.

2. Section 46 of the Judicial Code contains provision for hearings and rehearings in banc in the Courts of Appeal.

STATEMENT

The petitioner, The Western Pacific Railroad Corporation, hereinafter referred to as the "Corporation," owned from 1916 until April 30, 1944, all of the stock of the *pre-reorganization* The Western Pacific Railroad Company, predecessor of the respondent herein, the *reorganized* The Western Pacific Railroad Company. In 1935 the Corporation directed its railroad subsidiary to file a debtor's petition for reorganization (230 I.C.C. 61). The railroad properties were transferred by the bankruptcy court to reorganization trustees who held title to the properties and operated them from 1935 to December 31, 1944, a period exceeding nine years.

The Interstate Commerce Commission announced its plan of reorganization in 1939 (230 I.C.C. 61, 233 I.C.C. 409). The plan limited the first mortgage bonds of the reorganized company to $10,000,000 to be exchanged for trustees' certificates (Par. O, 233 I.C.C. 451) and it required the old first mortgage bondholders to exchange their securities for income bonds, preferred and common stock. Junior secured interests were not paid in full by at least $3,495,900, plus interest (R. 1222, 2021) and the new securities given to the old bondholders and to other secured creditors were in-

ferior in grade and have not had the values assigned to them by the plan (Appendix, p. 19). The plan declared that the stock interest in and unsecured claims against the debtor were totally valueless and not entitled to participate in the plan (Par. P. (5), 233 I.C.C. 452). On March 15, 1943, the Commission plan was approved by this Court in *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, affirming *In re Western Pacific R. Co.*, 34 F. Supp. 493. In October, 1943, the plan was confirmed by the District Court (R. 496, 1674), on December 31, 1944 the railroad properties were turned over to the reorganized company, the respondent here (R. 499, 1711; R. 36-108), and the reorganization proceeding was closed by a final order dated March 28, 1946 (R. 1219, 2013).

In each year beginning with 1918 the Corporation prepared, signed and filed in New York consolidated tax returns for itself and all group members (R. 1258-9; R. 843-44). In each year the tax owing under the returns was allocated among the group members according to the formula universally accepted, that is: the consolidated return tax was distributed pro rata to those members of the group having taxable incomes in direct proportion to their several taxable incomes, without allocating any tax to a "loss company" or paying such company for the tax "saved" by another member through the entry of the loss in the returns.[1] During the years 1924 to 1935 the Corporation

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[1]On the record now in this Court the proof is clear (R. 1262). Petitioner interveners challenge the corresponding statement of the Court of Appeals (their petition, pp. 21-22) and base their challenge on a Price Waterhouse report which respondent introduced in evidence as part of the proof of the facts as we have just stated them (R. 1504, 1510-1516, 1517). We believe the report

benefited in this way by tax reductions exceeding $500,000 (R. 1552, 2040).

This practice was continued during the reorganization. No taxable income was reported from 1935 through 1941 and no tax was paid (R. 1552, 2040). In 1942 and subsequent years the trustees had substantial income which could be offset by loss carry-overs and carry-backs, but only through the filing of consolidated returns (R. 591, 921, 1759). The consolidated returns for 1942 reported a tax of $4,201,821.54 (R. 172). With insignificant exceptions the tax resulted from the trustees' earnings and was paid by the trustees from the funds of the bankruptcy estate (R. 169, 824, 826, 1306-7).

The order confirming the plan of reorganization (R. 496, 1674) became final in November, 1943. The Corporation's stock loss was realized, for tax purposes, when the order became final (R. 606, 1409-10) and the loss was reported in the consolidated returns for 1943. Since the loss greatly exceeded the trustees' income the returns reported a large net operating loss and no tax was paid (R. 172). In recognition of the uncertainties in the 1943 tax situation, and upon the authority of an order of the reorganization court, the trustees set aside out of their 1943 income a reserve fund of $7,100,000 to meet contingent tax liability of the trustees to the United States (R. 619, 1772; R. 1270-74; R. 1272, 2023; R. 1087, 1895).

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supports our statement and refutes what the petitioners say. The report is a trial exhibit. Pursuant to an order of the Court of Appeals it was not printed in the record on appeal, and petitioners have not yet sent it up to this Court. It seems improper for petitioners to challenge a statement by the Court of Appeals on the basis of a trial exhibit which is not presently in the record in this Court.

In March, 1945 the Corporation, as agent for the affiliated group (Regs. 104, Sec. 23.12) filed a claim for refund of the taxes paid for 1942, based on a carry-back of a part of the unused balance of the Corporation's net loss for 1943 (R. 492, 1654). This was a claim for taxes which had been paid by the trustees.

The affiliation ended when on April 30, 1944, the Corporation surrendered its stock in the debtor company, i.e., the *pre-reorganization* The Western Pacific Railroad Company, and this stock was later cancelled as required by the reorganization plan (R. 260, 493). In the returns for 1944, filed in June, 1945 (R. 491), a further part of the unused balance of the net operating loss for 1943 was carried forward to the first four months of 1944 (R. 172). No tax upon trustee income for that period was reported or paid (R. 172). In order to meet contingent tax liability to the United States for this period the reorganized railroad company set up a reserve fund in the amount of $3,000,000. Thus the reserve fund set up to meet the contingent tax liability of the trustees aggregated $10,100,000.

In August, 1947 the taxes for these years were settled with the Treasury on the basis of denial of the refund claim and acceptance of the returns as filed (R. 168-173). This meant in substance that the tax liability of the trustees for the tax years in question was settled at $4,201,821.54, the amount paid by them for 1942. Although the settlement was effected in form by a total rejection of the refund claim, the $4,201,821.54 payment for 1942 was intended to be a settlement payment not for 1942 alone but for the entire period of two years and four months.

From first to last these tax transactions were handled in the ordinary course of business. The returns related to a

period of trusteeship during which affiliation continued—indeed, they were possible only because affiliation continued—and they were prepared, signed and filed and the allocation of intra-group liabilities was made in strict accordance with twenty years of prior practice.

The recital on page 5 of the Corporation's petition that the tax savings were "accomplished by respondent's taking over and managing petitioner's affairs for its own benefit" is far from correct. The fact is that the tax proceedings continued to be handled just as they had been handled in the past. The fact is, also, that the complaint of the petitioners is improperly addressed to the respondent. It was the reorganization court and its trustees who were concerned and who took action with regard to the entry of the deduction of the corporation's stock loss in consolidated returns. This was done during the trusteeship and before the plan was consummated, and respondent, the reorganized company, had no part in the action then taken. Respondent's participation consisted of taking its part in subsequent tax proceedings following reorganization in conformity with the conclusions reached by the court and its trustees.

The returns for 1942 and 1943 were prepared in the New York office, maintained jointly by the Corporation and its subsidiary, latterly the subsidiary's trustees, and by the same personnel who had prepared and filed prior returns (R. 1258-9; R. 843-44). There was no change in the established practice respecting preparation and filing, unless it be a change that, upon the recommendation of counsel for the Corporation, an experienced tax counsel was retained to advise the trustees regarding tax returns. Tax counsel recommended that the filing of consolidated returns

be continued, this being in the interest of the taxpayers. He advised entry of the Corporation's loss in the returns for 1943, as authorized by a 1942 amendment to the statute.

This advice was followed, but only after the matter had been presented by the reorganization trustees to the bankruptcy court. Tax counsel had advised that the Government might question the loss deduction, and for this reason the trustees presented the matter to the court and recommended that a reserve fund for contingent tax liability be created. On the hearing, it was explained to the court that through filing consolidated returns the Corporation's loss could be offset against trustee income and the court made its order for a reserve fund for contingent tax liability because of uncertainty as to whether the Government would litigate the matter (R. 1272-1273, 116).

Thus it appears that petitioners' complaint on the score that its tax affairs were taken over and managed is in fact addressed to the action of the court and its trustees.[2]

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[2]Petitioners use the term "respondent" as descriptive of three distinct entities: *first*, the pre-reorganization railroad company, which was the Corporation's subsidiary and the debtor in reorganization; *second*, the reorganization trustees who were the court's agents in operating the railroad; and *third*, the reorganized railroad company, which was the defendant below and is the respondent here. The indiscriminate use of the term "respondent" by petitioners can serve only to mislead and confuse. For example, at page 6 of the petition of the Corporation it is said that when petitioner was so impoverished that it could no longer pay its officers' salaries, "respondent took them over as its own 'full time employees' before the tax returns were filed." The fact is that this action was taken by the trustees in June, 1943, and that respondent had, and could have had, no part in it (R. 1230). Misuse of the word "respondent," frequently in designation of the trustees and at times in designation of the debtor company, occurs repeatedly throughout both petitions.

Respondent, the reorganized company, had nothing to do with these transactions. Respondent commenced its operations on January 1, 1945. Subsequently it did participate in the tax transactions, by way of setting up an additional reserve, and of consenting to the returns for the period January to April, 1944, which, while they related to the trustees' income and taxes, were filed in 1945. In these returns a part of the net operating loss reported in the returns for 1943 was carried forward in the manner provided by the revenue acts.

In all this there was no "taking over and managing petitioners' affairs," nor any departure from practice which the Corporation itself had inaugurated and followed.

Neither was any wrong done to the Corporation in the tax transactions. The Corporation's loss was of no use to it, and could be used only in the consolidated returns. The Corporation paid no taxes under the consolidated returns and would have paid none under separate returns.

Petitioners have no complaint about the tax returns. They agree that the returns were properly prepared, properly signed and properly filed, that the Corporation's loss was properly entered in the returns for 1943 and that the work of the tax counsel, whose duty was to obtain a favorable tax result for the group, discharged that duty in a completely satisfactory fashion (R. 1007, 1103, 1422).

The Corporation's claim was never presented to the bankruptcy court. This suit was filed on October 10, 1946, more than a year and nine months after the consummation of reorganization and more than six months after the reorganization proceedings had been closed by the entry of the final order of the bankruptcy court (R. 1219, 2013).

This is a claim upon trustee income. By its bill of complaint the Corporation "claims to be the beneficial owner" of the claim for refund of taxes paid by the reorganization trustees for the calendar year 1942 (R. 8), and also "claims to be the beneficial owner" of the reserves which had been set up out of trustee income in order to meet contingent tax liability of the trustees for the calendar year 1943 and the first four months of 1944 (R. 9).

THE HOLDING OF THE DISTRICT COURT

The District Court concluded that there was no equity in the Corporation's claim and ordered judgment for defendants. The court felt that there had been an "escape" from taxes which should have been paid to the United States, but was "compelled to rest decision upon the fundamental issue of the justice and equity of plaintiff's right, if any, to be paid for that which was escaped" (R. 272). The conclusion was reached that the Corporation had no such right."[3]

The District Court recognized the true nature of the Corporation's claim:

> "What plaintiff really seeks is not all or a share of the so-called tax saving. Rather it is a circuitous way of obtaining something in the nature of equity or value for its ownership, rejected in the reorganization plan. Or put differently, it is an effort to share in the earnings of the debtor during the reorganization period." (R. 272)

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[3]Petitioners inadvertently err in stating that the trial court's judgment was founded on the conclusion that there had been a tax escape. As to that, the trial court said: "That is not true. I think I also placed the decision on the ground that I couldn't see any reason why the plaintiff would be entitled to it anyhow" (R. 429).

The court also held:

> "Not only that, but the philosophy underlying Section 77 of the Bankruptcy Act stands as a barrier against the equitable validity of plaintiff's claim in this cause." (R. 273)

THE DECISION OF THE COURT OF APPEALS

By its decision herein the Court of Appeals affirmed the judgment below. The findings and conclusions of the District Court were sustained, it being said, "we agree with the principal holding of the trial court * * *" (R. 2227).

The Court of Appeals could find no equity in the Corporation's claim.

ARGUMENT

I.

PETITIONERS HAVE FAILED TO PRESENT A CASE CALLING FOR THE EXERCISE OF THE POWER OF SUPERVISION OF THE SUPREME COURT OF THE UNITED STATES.

The case tendered by the petitioners does not satisfy any of the criteria customarily recognized in the granting of a writ of certiorari. No question of federal law has been presented or decided in this litigation. The Corporation's bill of complaint expressly recites that "there is no statutory rule or regulation" which can be invoked; the claim advanced has been rested solely and explicitly upon the "established principles of equity" (Bill of complaint, R. 8). Its petition herein recites: "Fundamentally, petitioner is entitled to recover on the principles of unjust enrichment" (p. 10).

Neither has the court below announced "a new principle of law." In holding that there is no equity in the Corporation's claim upon the income of the reorganization trustees of its former rail subsidiary, by reason of consolidated tax returns which were properly filed and resulted in no loss or damage to the Corporation, the court has observed principles which are as old as equity.

This is a private controversy, it is of importance to these litigants only, and the issue turns upon general principles of equity.

A. There Is No Conflict Between the Decision Below and Decisions in Other Circuits.

Petitioners represent that the decision below is in conflict with the decisions in *George A. Fuller Co. v. Commis-*

sioner, 92 F.2d 72 (C.C.A. 2, 1937) and *Trinity Buildings Corporation of New York v. Commissioner*, 40 B.T.A. 1315 (1939). The asserted conflict does not exist.

In each of the cited cases the Commissioner of Internal Revenue declined to accept a consolidated return, and was sustained in his refusal, for the reason that the return failed to meet the statutory condition that "all the corporations which have been members of the affiliated group at any time during the taxable year" consent to and join in the filing. In short, the technical requirements of the statute as to joinder by all the affiliates had not been met.

These rulings present no conflict with the ruling in the instant case wherein there was no refusal on the part of any member of the Western Pacific group to join in the consolidated returns. According to its own pleading, the Corporation "consented" to the filing of the consolidated returns (R. 221). The court below, in expressing the view that it was the duty of the Corporation to join in the returns, thereby permitting the reorganization trustees to reduce their tax liability and without loss or damage to the Corporation, rested its conclusion on the special equities of this case, including the established practice of the Corporation and the obligations owing from a holding corporation to the unpaid creditors of its bankrupt subsidiary. This was a ruling upon the equities, it did not involve construction of any statutory provisions, and is not in conflict with the holding in the cited cases.

The decision of the Fifth Circuit in the *Shreveport Bank Cases*[4] is equally wide of the mark. Those cases decided a

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[4] *Commercial National Bank in Shreveport v. Connolly*, 176 F.2d 1004; same case sub nomine *Bank v. Parsons*, 145 F.2d 191, cert.

question of local law, namely that the agreement between the old bank and the new bank made the new bank a trustee for the old bank and accountable as such for the profits of its trust.

B. The Decision of the Court of Appeals and the Decision of the District Court Rest Upon Identical Grounds. The Trial Court Made Adequate Findings, Petitioners Made No Complaint Respecting Findings Upon Their Appeal, and the Court of Appeals Made No Findings of Its Own.

Both of the petitions for certiorari are in error in representing that the decision of the Court of Appeals has been made upon different grounds, or upon different legal theories, from those upon which the decision of the District Court was made. The District Court found against the equitable validity of plaintiff's claim. The Court of Appeals sustained, saying—"we agree with the principal holding of the trial court" (Opinion, footnote 12, R. 2227). The Court of Appeals disapproved only what it recognized as "dictum" in the trial court's opinion, pointing out that the trial court had itself recognized that its criticisms of the tax returns and the compromise tax settlement were nothing other than "dictum."

Neither has the Court of Appeals made any findings of its own, nor has it disapproved findings of the trial court. In point of fact there was no problem as to findings since, as the petitioning Corporation expressly stated in its opening brief on appeal (pp. 30-31), "while the facts are unusual they are not in dispute." Moreover, in their specifications

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den. 323 U.S. 796; trial court opinions, 28 F. Supp. 927, 44 F. Supp. 5, 64 F. Supp. 888, 72 F. Supp. 961. The Court of Appeals held that under Louisiana law the pledge made the new bank trustee. 176 F.2d 1008.

of error upon appeal (R. 2168, 2173) the petitioners failed to assign any error respecting findings or failure to make findings on the part of the trial court. No ground exists for returning the case to the trial court for additional or amended findings which were not sought upon appeal, nor would any purpose be served by requiring findings as to matters wholly irrelevant to the holdings below.

C. The Court Below Has Not Decided a Question of Federal Law.

1. The Corporation argues that the Court of Appeals stated a general rule that whenever consolidated returns may be filed with a resulting tax reduction to anyone, they must be filed (pet. 13-14). It is plain that the opinion does not state any such rule. The Court was ruling on the equities of the case before it. What the Court of Appeals held, and all that it held, respecting joinder in consolidated returns, was that in the circumstances of this case the Corporation was obliged in equity to join. The circumstances of this case include (1) the Corporation's own consistent practice of many years' standing, under which it had received and retained tax benefits from its affiliates' losses in prior years, (2) the fact that in filing the returns it surrendered nothing because it had no income or taxes nor any use for its loss, (3) the need to preserve the loss carry-overs and excess profits credits of the reorganization trustees, which (because the prior returns had been consolidated) could be preserved only through consolidated returns, (4) the obligation to its insolvent subsidiary and the unpaid creditors of its subsidiary resting upon the Corporation as parent company, and (5) the duties imposed by the bankruptcy act upon the stockholders of a corporate

bankrupt to take action appropriate to the preservation of the bankrupt estate. Under these circumstances and under settled rules the holding of the Court of Appeals was plainly right. *Consolidated Rock Products Co. v. Du Bois,* 312 U.S. 510, 522; *Bankruptcy Act,* Sec. 77(l), Sec. 7b; *Securities Comm'n v. U. S. Realty Co.,* 310 U.S. 434, 455. This holding rests upon the application of equitable principles to the particular facts of this case and does not involve or state a general rule concerning consolidated returns.

2. The intervener-petitioners' chief argument appears to be that "consolidated returns were designed and intended for the benefit of the parent" (pet. pp. 13-14) and that the court below, in holding to the contrary, misconstrued the federal tax laws. This argument has neither substance nor merit. There is not a line in the revenue acts which lends support to this contention nor do the cited cases so rule.

Petitioners are mistaken in appealing to the tax laws as the source of any right in the Corporation. The function and operation of the tax laws were exhausted when the amount of the tax was determined and the tax was paid. Revenue acts do not create private rights and the provisions of the Code do not purport to do so. *Meriwether v. Garrett,* 102 U.S. 472, 513; *United States v. Butler,* 297 U.S. 1, 61. This Court has made it clear that private controversies as to the allocation of taxes are to be determined by the principles of equity. *Phillips-Jones Corp. v. Parmley,* 302 U.S. 233.

There is nothing either in the cases cited or the material quoted by petitioners, or in the history of consolidated returns, to indicate that Congress intended to confer a special benefit on holding companies. The true purposes of

may not benefit indirectly from the tax advantages of their affiliates. Subsidiary companies usually derive no benefit, direct or indirect, from the tax advantages which their affiliates receive from subsidiary losses. Nevertheless, no loss affiliate, whether parent or subsidiary, receives payment for the tax advantage of its loss.

Petitioners argue that the Corporation's case is exceptional and they appeal to equity for a different rule in this case. The contention is, in brief, that because the Corporation had no use for its loss nor benefit therefrom, direct or indirect, it was entitled to a cash payment from the trustees' earnings at the expense of the unpaid creditors of its former subsidiary, the debtor company, and in repudiation of the practice which it consistently followed in tax dealings with its subsidiary. If this be an exceptional case the facts call strongly for adherence to the rule rather than for deviation from it. Furthermore, a claim for special treatment upon the special facts of a case does not present "a question of general importance" suggesting review by certiorari.

E. The Corporation Has No Right Qua Parent to "Tax Savings" Realized by the Reorganization Trustees, Nor Has It Any Right to Such Tax Savings by Reason of the Loss of Its "Economic Interest" in Its Former Subsidiary Through Consummation of the Reorganization Plan.

The petitioners argue that in this case the Corporation has been deprived of the indirect benefit which, as stockholder of the subsidiary, a parent company may receive from the tax advantage to its subsidiary and assign this as a reason why the Corporation should be paid.

In so far as this is an argument that as *ex parent* the Corporation has better rights than it would have as parent, the argument defeats itself. The Corporation as *ex parent* has lost, not improved, whatever rights it had when it was the parent company.

Moreover, there is no principle which could sanction a demand such as that of the Corporation in this case upon the income of trustees of its former subsidiary, whether that income be denominated "tax savings" or otherwise. The Corporation's loss of economic interest was effective upon the filing of the petition for reorganization under Section 77, as made clear by the decision of this Court in *Helvering v. Cement Investors*, 316 U.S. 527, in which it was said (p. 532):

> "In case of reorganizations of insolvent corporations, the creditors have the right to exclude the stockholders entirely from the reorganization plan. When the stockholders are excluded and the creditors of the old company become the stockholders of the new, 'it conforms to realities to date their equity ownership' from the time when the processes of the law were invoked 'to enforce their rights of full priority.' *Helvering v. Alabama Asphaltic Limestone Co.*, 315 U.S. 179. Under that approach, the ownership of the equity in these debtor companies effectively passed to these creditors at least when Sec. 77B proceedings were instituted."

The Corporation has expressly pleaded, by its supplemental bill of complaint, that its claim is rested upon "an obligation incurred by the trustees in their operation of the debtor's estate * * *." (R. 224) But in equity its ownership had passed to the unpaid creditors of its subsidiary

consolidated returns are well understood. They are, first, to facilitate the administration of the tax laws by relieving the Treasury of the burden of reallocating income and deductions on transactions between affiliated companies[5] and, second, to do tax justice between businesses organized as subsidiaries on one hand and business organized as departments on the other.[6] There is nothing here to suggest that Congress has any particular regard for holding companies.

The argument that the consolidated return system is intended to benefit holding companies is directly in contradiction to the conclusions of the Federal Trade Commission. In its investigation of utility holding companies the Commission reviewed in detail the use of consolidated returns, and concluded that "the subsidiary companies in a holding company group are entitled to the benefit of any savings in the group due to filing a consolidated return."[7]

Congress, in so far as it has indicated an intention as to who should receive the benefit of "tax savings" from consolidated returns, has indicated they should go to the operating companies of the group. Congressional Committees have been sharply critical of the practice which peti-

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[5]House Ways and Means Committee Rep. No. 704, 73d Cong., 2 Sess., p. 16; Senate Rep. No. 960, 70th Cong., 1st Sess., pp. 1, 13, 29.

[6]Memorandum of the Finance Committee of the Senate on the 1918 Act, p. 9; Senate Rep. No. 665, 72d Cong., 1st Sess., p. 9.

[7]Summary Report of the Federal Trade Commission to the Senate of the United States pursuant to Senate Resolution No. 83, 70th Cong., 1st Sess., on Economic, Financial and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Part 72-A, Sen. Doc. No. 92, 70th Cong., 1st Sess., p. 478.

tioners now advocate, that is, a practice whereby the parent company takes to itself the benefit of group "tax savings."[8]

Nothing need be added to make it clear that the petitioners cannot find in the revenue acts any foundation for the claim of the Corporation upon the "tax savings" of the reorganization trustees.

D. The Corporation's Claim Is Contrary to the Policy and Objectives of Section 77 of the Bankruptcy Act and Would Frustrate the Western Pacific Reorganization.

We would again emphasize that the Corporation is here seeking to enforce its claim against a reorganized railroad company as successor to the reorganization trustees of the Corporation's former rail subsidiary. Both of the opposing petitions persistently ignore the distinction between (1) the debtor company, which was a subsidiary of the corporation, (2) the reorganization trustees, and (3) the reorganized company, respondent herein, in which the Corporation has at no time had any interest. These distinctions are important and are not to be disregarded. The tax

[8]Senator Wheeler, chairman of the Senate Committee on Interstate Commerce, in speaking of this practice said of the holding companies: "So that, as a matter of fact, they took that $9,000,000, which should have gone either to the Government, or, if it was not necessary to pay it to the Government, then it should have gone back to the operating company." Hearings before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., on S. 1725, p. 255. Similar comments appear in Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st Sess., on H.R. 5423, pp. 153, 849, 992, 1061, 1522; Hearings before the Committee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess. on S. 1725, pp. 83, 122, 255, 557.

returns with which we are here concerned are tax returns for periods within the trusteeship, the taxes were paid by the trustees out of their income, and the tax savings are tax savings of the trustees. The Corporation's claim is necessarily a claim against the trustees, and the Corporation has so pleaded.

But the Corporation's claim, even if it had substance, cannot be asserted against respondent, the reorganized railroad company. The claim here asserted never acquired validity against the reorganization trustees, not having been presented to and approved by the reorganization court, which alone had jurisdiction to entertain it. Had the claim been there presented, approved and paid, its payment would have been an expense of administration within the express control of the reorganization court under the statute. In no forum, other than the reorganization court, could the Corporation's claim be advanced or entertained.

As pertinently observed in the opinion of the District Court, the Corporation's claim represents "an effort to share in the earnings of the debtor during the reorganization period" (R. 272). It is to take precedence over the claims of secured creditors, now stockholders in the reorganized company. It was clear to the District Court that the philosophy underlying Section 77 of the Bankruptcy Act "stands as a barrier against the equitable validity of plaintiff's claim in this cause" (R. 273). The policy and objectives of Section 77 of the Bankruptcy Act would be set at naught and the Western Pacific reorganization would be frustrated if the Corporation were allowed recovery against the reorganized railroad company on the basis of

a claim related to the period of reorganization and which was neither advanced nor considered in that proceeding.[9]

It remains only to observe that this is a private controversy, it is of importance to these litigants only, and the issue turns solely upon general principles of equity. The District Court found no equity in the Corporation's claim upon the "tax savings" realized by the reorganization trustees of the Corporation's former rail subsidiary, and the Court of Appeals affirmed that holding.

II.

THERE IS NO EQUITY IN THE CORPORATION'S CLAIM TO THE "TAX SAVINGS" OF THE REORGANIZATION TRUSTEES

Although a ruling upon the equities does not involve a question of federal law it can readily be demonstrated that the Corporation's claim is without the pale of equity.

A. The Corporation Has Suffered No Wrong and Sustained No Damage, and Has No Unjust Enrichment Claim.

The reorganization court confirmed the Commission's plan of reorganization and thereby adjudicated the Corporation's stock loss. Under the authority of the Revenue Act the loss was entered as a deduction from income in the consolidated returns. Nothing in this process constituted a wrong to the Corporation. No tort was committed; no

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[9]The Corporation's failure to present its claim in the bankruptcy proceeding bars the claim under the orders of the Court in that proceeding and under the principles of *res judicata*. The claim is also barred by the California statutes of limitation. These defenses were presented below and respondents rely upon them but the courts below found it unnecessary to consider them, having ruled that the claim was without equity.

property was taken; no contract was breached; no statutory right was infringed. The Corporation, therefore, has no cause of action.

The Corporation was not damaged. It paid no tax under the consolidated returns just as it would have paid no tax under separate returns. The failure of the reorganization trustees to pay additional taxes was not, in contemplation of law, an enrichment. Even if it were, the enrichment was not unjust to the Corporation, and without proof of injustice to the Corporation it cannot recover. The entry of the loss in the returns cost the Corporation nothing. The Corporation had no income, it could not have used the loss itself and could not have sold it. *J. D. and A. B. Spreckels Co. v. Commissioner*, 41 B.T.A. 370 (1940).

These are the facts which brought about the "tax savings" of the reorganization trustees, and there is in them no element of contribution or unjust enrichment, or of any other cause of action known to the law. "Wrong without damage or damage without wrong does not constitute a cause of private action * * *." *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (C.C.A. 8, 1945), cert. den. 326 U.S. 734. Compare *Connecticut Ry. Co. v. Palmer*, 305 U.S. 493, 504.

B. The Corporation Has No Claim Arising from Fiduciary Obligations.

The income and the tax savings under discussion are for a period in the trusteeship prior to May 1, 1944, a period when the Corporation was the sole stockholder of the old company. As parent, the Corporation had fiduciary responsibilities to its subsidiary and particularly to the sub-

sidiary's creditors. "A holding company, as well as others in dominating or controlling positions (*Pepper v. Litton*, 308 U.S. 295), has fiduciary duties to security holders of its system which will be strictly enforced. See *Taylor v. Standard Gas Co.*, 306 U.S. 307." *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 522.

The fact that the returns for 1943 and 1944 were physically filed after the Corporation had surrendered its stock to the reorganization committee does not affect the Corporation's obligations. The returns related to the period of affiliation and to the period of trusteeship, and the obligations of the parties with respect to them were therefore the obligations of those periods. The Corporation was not entitled to prefer its own interest over the interest of the unpaid creditors of its former rail subsidiary by demanding a "tax savings" payment out of income of the trustees on account of an entry in the tax returns which cost the Corporation nothing.

C. It Was the Duty of the Corporation to Join in Filing Consolidated Returns and It Could Not Bargain as a Condition to Such Joinder.

The Court of Appeals addressed itself directly to the contentions of petitioners, particularly interveners, that the Corporation could have exacted a "bargain" from the reorganization trustees in consideration of continued joinder in the tax returns. The Court of Appeals pointed out that, while the Corporation suffered a severe loss through the decision of this Court upholding the plan of reorganization, nevertheless "there was no possible way for it to achieve any tax advantage to offset the loss. But its affiliate did have use for the loss and the group was entitled, under the

tax law, to make use of that means of tax savings" (R. 2232). There was a duty to make use of the loss to offset the income of members of the affiliated group. Such had been the practice of the group in previous years of affiliation and "Corporation had effected substantial tax savings (Def. Ex. 46) by reason of filing consolidated returns." The Court observed that "The officers would have been derelict in their duty to the subsidiary had they failed to file consolidated returns," and added that "After the transaction Corporation was in exactly the same position that it was in before the subsidiary had effected the tax saving allowed by the tax laws" (R. 2233).

Not only was there no duty on the part of the Corporation to exact such tribute but it was the affirmative duty of the Corporation to refrain therefrom. In this aspect of the case the conclusions of the Court of Appeals were as follows:

> "If Corporation had required tribute as a condition of its cooperation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors. Equity will not permit a recovery as a substitute for a bargain which would have been unfair." (R. 2235)

The suggested "bargain" to have been "exacted" by the Corporation would necessarily have been so exacted from the reorganization trustees who could not have yielded without the approval of the reorganization court. But would that court have yielded? This Court has said respecting such strategic efforts:

> "In these proceedings there is no occasion for the court to yield to such pressures."
>
> *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 129.

As sole stockholder of the old company the Corporation had general fiduciary duties to its subsidiary, particularly in the interest of the latter's creditors (*Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 522) and special duties arising out of the bankruptcy proceeding to conserve the assets for the benefit of creditors (3 *Collier on Bankruptcy* (14th Ed.) Par. 62.30, page 1573). It was the legal duty of the Corporation, and alike its moral duty, to join in these returns for the protection of the creditors of its former subsidiary, and no loss or disadvantage to the Corporation itself could result from such joinder.

D. Petitioners Do Not Escape the Application of the Accepted Rule Against "Tax Saving" Payments in Consolidated Return Tax Allocations by Claiming That Their Case Is Exceptional.

There is a formula for the allocation of consolidated return taxes among the members of an affiliated group under which the tax is borne ratably by the members of the group having incomes, but no payment is made to a loss company for the tax advantage which its loss brings to other members of the group. This formula has been approved by the Federal Trade Commission, the Securities and Exchange Commission and the Treasury Department.[10] The semi-official National Association of Railroad and Utilities Commissioners has reached similar conclusions.[11]

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[10]By the Federal Trade Commission, op. cit. note 7 supra, pp. 478-9; by the Securities and Exchange Commission in its Rule U-45(b)(6); by the Treasury Department in I.T. 3637, C.B. 1944, 258; I.T. 3692, C.B. 1944, 261; and I.T. 4085, issued June 1952, C.C.H. Standard Federal Tax Reports, par. 6219.

[11]Reports of the Committee on Accounts of the National Association of Railroad and Utilities Commissioners, for 1943 at pp. 255-6, for 1945 at pp. 458-60.

This formula has been accepted by the business community for many years[12] and it is the formula which the Corporation has used since 1918 when it commenced filing consolidated returns for the Western Pacific group (R. 1262).

One reason for the formula is to protect the public which is served by operating subsidiaries, as well as the security holders of subsidiaries, from upstream payments or credits to the parent company. The formula is also needed to prevent the sort of bargaining about tax losses that is demanded here. Other reasons for the formula are indicated in the studies of the Federal Trade Commission and the Securities and Exchange Commission.[13] The Treasury Department by I.T. 4085 issued in June, 1952, recently reaffirmed its prior use of the formula for tax purposes.

The formula operates without regard to whether loss companies derive benefit from its application. Depending on the facts of the particular case parent companies may or

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[12] As reported in Release No. 53, Accounting Series, Securities and Exchange Commission, November 16, 1945, on "Charges in lieu of taxes," reported in 61 P.U.R. (N.S.), at pp. 193-225. The Commission says of the business custom in note 36, p. 222, that "In assigning to each constituent its fair share of the consolidated tax paid by the group it is usual to divide the actual tax among the companies who would have had to pay a tax on an individual basis. If one of the included companies operated at a loss, the consolidated tax is of course reduced, but *no* part of the 'saving' is ordinarily paid over to the loss company by the other members of the group. Instead, only those *contributing* income to the consolidated return share directly in the benefit of the current reduction. This principle is incorporated in our Rule U-45 under The Public Utility Holding Company Act."

[13] Federal Trade Commission, op. cit. note 7, supra; Securities and Exchange Commission, Release No. 53, Accounting Series, 61 P.U.R. (N.S.) 193.

when the subsidiary filed its petition for reorganization under Section 77. Thereafter the earnings of the subsidiary or, more correctly, the earnings of the subsidiary's reorganization trustees, belonged in equity to the creditors and could not be claimed by the Corporation at the creditors' expense.

F. The Corporation Has No Claim on Account of Duality or Domination.

Petitioners rely upon so-called "dual relations" to implement the Corporation's claim upon the tax savings of the reorganization trustees. This reliance is misplaced.

Quite naturally, and indeed properly, the Corporation and its wholly owned rail subsidiary had certain officers in common upon the inception of the reorganization proceedings. These dual relations continued in some measure throughout the reorganization period. Thus one of the trustees, appointed at the instance of the Corporation itself, was an officer of both the Corporation and its rail subsidiary. The remaining "dualities" were all attributable to the Corporation which brought them into being and sponsored their retention. Moreover, they had statutory sanction (Bankruptcy Act, Section 708(c)(1)) as well as the approval of the reorganization court (R. 1187, 1916, par. 2, at 1920-21, R. 1192, 1923), and were not a mask for undisclosed transactions of any character.

Duality itself is not wrongful. It does not give rise to a cause of action, nor can it implement a cause of action, unless wrong or unfairness issues therefrom.

Here there was no wrong or unfairness to the Corporation by virtue of the asserted dualities, however critically they may be examined. The two trustees discharged their

duties under the direction of the reorganization court and with full knowledge and to the satisfaction of all parties. The recitation of dualities in which the petitioner-interveners have indulged is barren of any evidence of wrongdoing. It was not wrongful on the part of the trustees to join in the consolidated tax returns for 1943, nor was it wrongful to enter the Corporation's stock loss therein as a deduction from the trustees' income. It was not wrongful for the special tax counsel retained by the trustees to advise the entry of the Corporation's stock loss as a deduction from income. After reorganization had been consummated and the trustees had been discharged it was not wrongful on the part of the Corporation's president to sign and file the returns for 1944 and the claim for refund of taxes paid by the trustees for 1942. These were the natural and proper consequences of what had taken place during the trusteeship. Accordingly, this is not a case in which "duality" cloaked wrongful conduct or unfairness or has significance for any purpose. Thus an essential ingredient of a cause of action, viz., wrong or unfairness, is lacking.

The District Court recognized the fact of dual relations but concluded that "The so-called 'duality of control' much discussed and emphasized, is not important in resolving the tendered issue" (R. 274). The Court of Appeals expressly approved (R. 2235). Both courts found that no injustice or unfairness to the Corporation had issued from the duality. The claim of domination is equally devoid of substance. The Corporation has no standing to exploit the domination theory in view of its express denials of all allegations of "domination and control" by its answer to the Complaint in Intervention in this cause. These denials are in the following terms:

"The plaintiff denies on its own behalf and on behalf of its officers and directors all allegations of the Complaint in Intervention of domination and control of the plaintiff, its officers and directors, by the James Foundation of New York, Inc., and The Western Pacific Railroad Company, or any one or more of the subsidiaries or affiliates of either; * * *." (R. 156) (Cf. Opinion of Court of Appeals, R. 2224, footnote 7)

These denials are unqualified.

The opinion of the Court of Appeals deals explicitly and realistically with the asserted duality in conjunction with the claim of domination. The Court of Appeals concluded:

"The record is barren of evidence to support the contention that Corporation was dominated by the subsidiary, or that there was a breach of any duty owed to Corporation." (R. 2235)

Upon the assumption, however, "that the subsidiary dominated Corporation through control of the dual officers," the Court of Appeals nevertheless found that "it did not abuse its supposed dominant position because the officers and directors common to both corporations did not sacrifice Corporation's interests to those of the subsidiary" (R. 2232). The Court said that the dual officers owed fiduciary duties to both corporations to promote the interests of both and to obtain for each what it was entitled to under the tax laws. These duties were properly discharged. Finally the court said:

"The officers would have been derelict in their duty to the subsidiary had they failed to file consolidated returns. Their duty to Corporation required only that they not sacrifice its interests and did not require them to exact tribute for following the practice of the past twenty-five years." (R. 2233)

All of the transactions in relation to the tax returns were "open and above board." The District Court so found and the Court of Appeals approved that finding (R. 2234). Neither court could find injustice or unfairness in the tax transactions.

Such being the case, the petitioners' arguments directed to "duality" and "domination" are without a semblance of vitality.

III.

IN DISPOSING OF THE PETITIONS FOR REHEARING THE COURT HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The petitions for rehearing were denied and in so far as they sought rehearing in banc they were stricken as being without authority in law or in the rules of practice of the court (R. 2259).

On July 9, 1952, after the petitions for certiorari were filed herein, the court below rendered its opinion and decision in banc, denying the petition of the Corporation for leave to file a "motion to vacate order striking appellants' petition for rehearing en banc and reinstating such petition." The petition is in the record at R. 2267.

The full Court, with one dissent, reviewed its procedures for considering rehearings in banc and said, in the concluding paragraphs of its opinion:

> "On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether

to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties.

It has been remarked by some commentators that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts. The hazard, we think, may easily be overestimated. It is minimized by the alertness of counsel and by informal and unofficial interchanges among the judges. Where conflicts occur they are capable of remedy by in banc action without wholesale duplication of effort, as our own practice and experience have demonstrated.

The petition for rehearing in this cause has already been authoritatively denied by the division to which the cause was assigned. The petition for leave to file, addressed to the court in banc, is denied.

From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

Copies of the opinion of the court and of the dissenting judge are attached as an appendix to this brief.

Under Section 46(c) of the Judicial Code the full court has power to grant a rehearing in banc, but it does not follow, as contended in the Corporation's petition (p. 30), that "a litigant must be entitled to have his request presented to all those judges for consideration and action." It has never been so ruled. If such were the rule it would mean that every disappointed litigant could insist upon a review by the full court. This would impose impossible burdens. The ruling of the court below was clearly right.

No litigant is entitled to complain about the treatment of a petition for *rehearing*. Rehearings are matters of discretion and no appeal lies from the denial or other disposition of petitions for them. *Wayne Gas Co. v. Owens-Illinois Co.*, 300 U.S. 131, 137-8; *Pfister v. Finance Corp.*, 317 U.S. 144, 149-50.

CONCLUSION

It is respectfully submitted that the petitions for a writ of certiorari should be denied.

Dated: July 18, 1952.

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Appendix I

OPINION AND DISSENTING OPINION OF JULY 9, 1952, IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUP. BAYARD, Receiver, *Appellants,* vs. WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY, DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY COMPANY, THE STANDARD REALTY AND DEVELOPMENT COMPANY and DELTA FINANCE CO., LTD., *Appellees.*	No. 12,506 Jul, 9, 1952

IN RE PETITION OF WESTERN PACIFIC RAILROAD CORPORATION FOR LEAVE TO FILE A MOTION DENOMINATED "MOTION TO VACATE ORDER STRIKING APPELLANT'S PETITION FOR REHEARING EN BANC AND REINSTATING SUCH PETITION."

BEFORE: DENMAN, MATHEWS, STEPHENS, HEALY, BONE, ORR, and POPE, Circuit Judges

HEALY, Circuit Judge

Case No. 12,506, supra, upon its coming at issue in this court, was regularly assigned for hearing and determination to a court or division of three judges comprising Circuit Judge Healy and District Judges Fee and Byrne. Subsequent to argument and submission of the case the court

handed down an opinion and order affirming the judgment of the district court, Judge Fee dissenting. —— F. 2d ——. Thereafter the appellants petitioned for "rehearing and rehearing en banc," and the court on January 30, 1952, denied the petition, Judge Fee again dissenting. —— F. 2d ——. Insofar as the petition sought a rehearing in banc it was ordered stricken as unauthorized by law or practice.

On March 10, 1952, the Western Pacific Corporation presented the petition for leave described in the caption. In its supporting brief it asserts that it is its right under the law to have its petition for rehearing considered and acted upon by all the circuit judges. On order of a majority of the circuit judges, the court has been assembled in banc for the purpose of announcing the principles of law and practice it deems applicable in respect of in banc hearings. This course is thought appropriate in order that litigants and the bar may be advised not only of the position taken by the court but of the reasons for it.[1]

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[1]In recent years it has become the custom of counsel almost as a matter of course to petition the full membership of the court for a rehearing in banc, upon suffering an adverse decision at the hands of a court of three judges. This hopeful concept of the right of litigants appears to stem from declarations in the dissenting opinion in Independence Lead Mines v. Kingsbury (1949), 9 Cir., 175 F. 2d 983, at p. 992, cert. den. 338 U. S. 900, to the effect that two judges in a court or division of three are without authority to pass upon or deny a petition for rehearing addressed to all the circuit judges.

The numerous petitions of this nature have been disposed of by the court or division concerned either (1) by ignoring the application for in banc action and treating the petitions simply as ordinary petitions for rehearing, or (2) by striking them insofar as they sought in banc action. The treatment has not in the least served to discourage losing counsel or to stem the growing tide of such petitions.

The governing statutory provision, 28 USCA §46(c), reads:

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."[2]

The obvious intendment of this statute is to perpetuate the United States Courts of Appeals as courts of three judges in all cases save those in which an in banc hearing is ordered by all or a majority of the circuit judges. No doubt Congress was fully alive to the fact that these courts, despite the increase in their membership, would be unable to keep abreast of the constantly growing volume of judicial business unless they continued in all normal circumstances to function as courts of three.

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[2]The section was enacted as part of the 1948 Judicial Code revision. In its entirety it reads as follows:

"§46. Assignment of judges; divisions; hearings; quorum

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

Important light will be shed on the problem under inquiry if we examine the method pursued in the assignment of cases, as prescribed by our Rule 4.[3] In practice the calendars for the court are tentatively made up by the chief judge in collaboration with the clerk. On these calendars each case is assigned for hearing and determination to a court or division of three named judges, unless it has been otherwise ordered. The proposed calendar is circulated among all the judges, and any designation or assignment may be modified or set aside by a majority. When the calendar is approved by the judges their action is uniformly manifested by their initialing the same, as is done in the case of court orders generally. Thus the calendar as finally adopted evidences or necessarily implies at least the tentative determination of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc. In the instances in which at the time of assignment it is agreed by all or a majority of the judges that a particular case should be heard and determined in banc, it is calendared as such.[4] It sometimes occurs, too,

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[3]Rule 4, subdivisions 1 and 2, reads:

"ASSIGNING OF CAUSES FOR HEARING

"1. The calendars of the court shall be made up by the Clerk under the direction of the Chief Judge subject to the approval of the majority of the judges.

2. The Chief Judge after conference with the Circuit Judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be modified or set aside by a majority of the judges."

[4]Since the decision in Textile Mills v. Commissioner, 314 U. S. 326 (1941) approximately thirty cases in all have been heard in banc in this circuit. Nineteen of these, or about two-thirds of the whole, were assigned to the court in banc at the time they were originally calendared. Perhaps more than half of the nineteen were cases of

that examination of a case preliminary to hearing, or consideration of it after argument, leads the judges to whom it was assigned to conclude that it is an appropriate cause for in banc consideration, and they so indicate to the remaining judges. If the latter or a majority of all agree, the case is then reassigned for hearing by all the judges.[5]

If we examine the status of Case No. 12,506 in the light of this practice, it becomes apparent that it was calendared and heard by court order as one in which in banc consideration was not deemed requisite. There remains to inquire whether the losing party in the cause is at this juncture entitled as of right to have its petition for rehearing considered and ruled upon by a court composed of all the circuit judges.

The statute, it will be recalled, commits to a "court or division of three judges" the power to *hear* and *determine* the cases and controversies assigned to it. Obviously its determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision,

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great public consequence, such, for example, as those growing out of the suspension during the war of the writ of habeas corpus and the institution of martial law in Hawaii, or cases involving the forcible removal of the Japanese from the Pacific Coast states. Others were contempt matters involving claimed violations of the constitutional prohibition against self-incrimination.

There are no definite criteria that we know of by which to determine what cases are suitable for in banc consideration. However, causes of extraordinary public importance or those involving constitutional questions probably belong in the category.

[5]McCoy v. United States, 9 Cir., 169 F. 2d 776; Samuel v. United States, 9 Cir., 169 F. 2d 787; Tee Hit Ton Tribe v. Olson, 9 Cir., 160 F. 2d 525; Los Angeles Building & Construction Trades Council v. LeBaron, 9 Cir., 185 F. 2d 405; Price v. Johnston, 9 Cir., 159 F. 2d 234, 161 F. 2d 705.

subject to review only as prescribed by 28 USCA §1254. Circuit judges other than those designated to sit on such court or division are not members of it, and officially they play, and are entitled to play, no part in its deliberations at any stage. That this is so is made clear by subdivision (a) of §46 (see Note 2 above) providing that "Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs." If regard be had for this mandate circuit judges may not intrude themselves, or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit.

A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. If the court so constituted, or a majority of its members, denies the petition, that ends the matter so far as concerns the Court of Appeals. If it grants a rehearing it may follow either of two courses: (a) it may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate suggest to the nonparticipating judges that the case is one which ought to be reheard in banc; and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration.[6]

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[6]This was the course followed in Hopper v. United States, 9 Cir., 142 F. 2d 181; Southern Pacific Co. v. Guthrie, 9 Cir., 180 F. 2d 295, 186 F. 2d 926; Evaporated Milk Ass'n v. Roche, 130 F. 2d 843; and Pacific Gas & Electric Co. v. SEC, 139 F. 2d 298. In the **Hopper** case, supra, and to a lesser degree in Southern Pacific v. Guthrie, intracircuit conflicts were resolved. The other two cases cited in this note were nondescript matters.

Adoption of the view currently being urged would render merely tentative or provisional the decisions of the court in 98 per cent or more of the cases that come before it. On petition of a dissatisfied party its decisions would automatically be subject to a species of horizontal appeal which would completely nullify the prime statutory objective of effecting a division of the court's work. The judges other than those to whom the cases had been assigned would perforce be required to acquaint themselves with the issues and problems involved in the same painstaking manner as did their associates who had heard and determined the causes initially, and this without the latter's advantage of having heard oral argument. Obviously, unless he is prepared to stultify himself, no judge would undertake to rule upon petitions for rehearing without adequate and full study and investigation of the merits.

On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties.

It has been remarked by some commentators that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts. The hazard, we think, may easily be overestimated. It is mini-

mized by the alertness of counsel and by informal and unofficial interchanges among the judges. Where conflicts occur they are capable of remedy by in banc action without wholesale duplication of effort, as our own practice and experience have demonstrated.

The petition for rehearing in this cause has already been authoritatively denied by the division to which the cause was assigned. The petition for leave to file, addressed to the court in banc, is denied.

From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing.

DENMAN, Chief Judge, dissenting from the court's holding that the circuit judges not participating in a division, here six of the seven judges, (a) are without power to consider a litigant's petition for a rehearing en banc, and (b) where a rehearing or rehearing en banc has been denied by a division, are without power to vote to grant a rehearing en banc, if two of the division's judges, here with but one circuit judge, do not desire such a rehearing. This appears from the following language of the opinion:

> "A petition for rehearing in any such case, whatever its form or wording, *must necessarily*[1] be treated as addressed to and is *solely* for disposition by the court or division to which the case was assigned for determination. If the court *so constituted*, or a majority of its members, denies the petition, *that ends the matter so far as concerns the Court of Appeals.* If it grants a rehearing it may follow either of two courses: (a) it

[1]Emphasis hereafter appearing in quoted matter is supplied.

may, and in all ordinary situations does, rehear the case itself; or (b) it may for reasons thought adequate *suggest to the nonparticipating judges that the case is one which ought to be reheard in banc;* and if all or a majority of the circuit judges agree, the case is then placed on the calendar for in banc consideration."

* * * *

"The statute, it will be recalled, commits to a 'court or division of three judges' the power to *hear* and *determine* the cases and controversies assigned to it. Obviously *its* determination of any such case or controversy is a decision of the Court of Appeals, and as such is a *final decision, subject to review ONLY as prescribed by 28 U.S.C. §1254.*" Thus squarely is denied the power of the court en banc to review a division's decision in a "rehearing en banc . . . ordered by a majority of the circuit judges." See 28 U.S.C. 46 (c).

* * * *

"From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

In this case the Western Pacific Railroad Corporation, hereafter the Corporation, petitions the Court en banc for leave to file a petition for a rehearing en banc. The latter seeks to establish, inter alia, that the judgment of the division which heard the case decided the main issue therein contrary to the decision of a prior division of this court. The division in the instant case, consisting of one circuit judge and two district judges, has ordered "stricken" a petition addressed to the seven judges constituting the court en banc. This order follows a precedent of similar

strikings of petitions for rehearings en banc in the cases of Kronberg v. Hale, 181 F.2d 767 (Cir. 9), Fruehauf Trailer v. Myers, 181 F.2d 1008 (Cir. 9), Northwestern Mut. Ins. Co. v. Gilbert, 182 F.2d 256 (Cir. 9).

Since Kronberg v. Hale, the Clerk has distributed no petitions for rehearings en banc to the non-participating circuit judges. From a casual remark of counsel in a social contact, I learned of the Corporation's instant petition and instructed the Clerk to distribute it to the six circuit judges not sitting in the division. But for this casual discovery and my suggestion that the stature and determination of the Corporation's counsel made it likely they would seek mandamus in the Supreme Court, the petition would have had the "striking" treatment of the above cases.

The court's opinion came after a conference originally called for the consideration of the adoption of the rule considered last in this dissent, which would have made the burden of such petitions one we easily could bear.

A. *The court's decision violates (as well as ignores) the Supreme Court's decision in United States ex rel. Robinson v. Johnston, 316 U.S. 649, 650, a decision aimed to settle differences in the circuit's divisions.*

The case of Textile Mills Corp. v. Commissioner, 314 U.S. 326, held that notwithstanding the three-judge provision of section 212 of title 28, U.S.C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal.

The Third Circuit in C.I.R. v. Textile Mills Corp., 117 F. 2d 62 at page 70, in holding that its five circuit judges could

sit en banc, states that otherwise they would not have the power to correct differing views of the judges in the divisions of the court such as the Supreme Court describes as occurring in the Fifth Circuit in John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181.[2]

The Supreme Court in its Textile Mills case at page 334 in affirming the Third Circuit and overruling our decision in Lang's Estate v. C.I.R., 97 F.2d 867, 869, where we held we could not sit en banc where two divisions of the court differed as to the law controlling, states of rehearings en banc[3] that:

> . . . "Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those consid-

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[2]Following this the Textile Mills case states at page 71:

. . . "Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question . . ."

[3]What is said of the need of rehearings en banc for the then Third Circuit applies a fortiori today to the Ninth Circuit. The Third Circuit in the 1941 fiscal year had but five judges and 285 docketings. The Ninth Circuit has had an increase in population of six million in twelve years. In the fiscal year 1952 it had 446 docketings. On the national average of docketings for circuit judges the Ninth Circuit should have ten judges. It has seven judges but the Senate has passed a bill increasing the judgeships to nine and the House Judiciary Committee has agreed they are needed. No doubt within a year we will have nine judges with three divisions sitting simultaneously. That is to say, we have 56% more docketings and will have almost half again the number of divisions in which exist the hazard of conflicting decision referred to in the Textile Mills decisions.

erations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases . . ."

In enacting 28 U.S.C. § 46(c) Congress codified the Textile Mills decision, the Reviser's Notes stating that that section "preserves the interpretation established by the Textile Mills case."

Prior to this codification of the Textile Mills decision, there was decided by one division of this circuit the case of Robinson v. Johnston, 118 F.2d 998, and later in a division of three other judges, the case of Crockett v. United States, 125 F.2d 547. The two divisions differed on the controlling law. Certiorari was sought in the Robinson case before the Crockett case was decided and it was denied. A petition for rehearing in the Supreme Court was denied. The Crockett case was then called to the attention of the court in a second petition for rehearing which was granted. The order denying the petition for certiorari was set aside and the writ of certiorari granted. Certainly this action of the Supreme Court was purposeful and deliberate.

In granting certiorari the Supreme Court in United States ex rel. Robinson v. Johnston, 316 U.S. 649, held it was the duty of this court en banc to entertain a petition for leave to file a petition for rehearing en banc, for it vacated our judgment and remanded the case to us, stating:

> ". . . In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (see Robinson v. Johnston, 118 F.2d 998, 1001, and Crockett v. United States, 125 F.2d 547, 548, 549), and in view of this Court's decision in Waley v. Johnston, ante, p. 101, reversing 124 F.2d

587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including *leave* to petitioner to apply for a hearing before the court *en banc*. See Textile Mills Corp. v. Commissioner, 314 U.S. 326 . . ."

The Corporation strongly urges the above contentions in its denied petition, all of which is ignored in this court's opinion. Instead it is said of the seeking of the leave to file the petition, that consideration of such action by any of the circuit judges not in the division (here six) would be "to *intrude* upon a . . . division on which they have not by order of the court been directed to sit."

How absurd it was, one must conclude, for the Supreme Court to order such an intrusion in Robinson v. Johnston!

B. *The Cavalier Refusal of the Court to Consider the Contentions of the Corporation's Petition.*

The shabby treatment of the litigant and his counsel in refusing to consider their contentions and authorities comes after the court's claim that its opinion gives consideration to "*the principles of law * * * which it deems applicable to en banc hearings.*"

No self respecting federal judge sleeps comfortably if he is conscious of having rendered an opinion deciding a case in which he has *purposely* failed to consider a substantial contention supported by authorities submitted to him and by such evasion has based his decision on a ground directly opposed to the evaded contention.

A possible explanation for the silent treatment of the litigant's contention and authorities in this case is that Robinson v. Johnston was deemed irrelevant because de-

cided before the codification of the Textile Mills case in 28 U.S.C. § 46(c). That seems absurd, however, for the Supreme Court's construction of a law before its exact codification, as here, is applicable after codification. Otherwise, why in 28 United States Code Annotated are there the thousands of citations in sections of the Judicial Code, enacted in 1948, which codifies the then law and statutes?

C. *The Opinion's Absurd Misstatements Respecting the Assignment of Cases to the Court's Divisions.*

The opinion states:

> "... Thus the calendar as finally adopted *evidences* or necessarily implies at least the *tentative predetermination* of the judges that the cases assigned to courts of three are not of such character as to warrant their being heard before the court in banc ..."

The Supreme Court in the Textile Mills case has established a definite criterion for the rehearings en banc provided for in 28 U.S.C. § 46(c). It is the only one there stated, though there are others. It is that conflicts of law between the decisions of two of the court's divisions are cause for rehearing en banc. By clearing the law en banc, the circuit does so for the 96.3% of litigation in which this court's decisions are final.

Such en banc action prevents the burden on the Supreme Court, such as in the certification of the question of such differing divisions in Lang's Estate v. C.I.R., 97 F.2d 867, 869, a burden the Supreme Court later refused to assume in its return of Robinson v. Johnston for our en banc consideration of our divisions' divergencies.

It is almost a rude question to ask, "How, in heaven's name, are the seven judges en banc to know tentatively or otherwise that the division to which they assign the case will thereafter decide it without conflict with a prior decision of a different division"? The phrase, "How, in heaven's name," is used advisedly, for our tentative decision would require divine omniscience.

The opinion states that another criterion is whether the case to be assigned to a division is "one involving constitutional questions."

The slightest reflection shows that the court en banc could make its tentative assignment of a case to a division because *not* involving a constitutional question only by examination of all the briefs in all the cases to be assigned to determine whether such a constitutional contention is at issue.

Were this truly what we have done, it would have involved a volume of judicial effort comparable to that the court's opinion seeks to avoid with petitions for rehearings en banc.

In the eleven years since the Textile Mills case, the Clerk advises, we have assigned to division over two thousand two hundred cases. In but nineteen cases, less than one per cent, have they been assigned to the court en banc. These were cases whose extraordinary importance had wide newspaper notoriety. In *none* of the remaining two thousand two hundred cases has the court en banc assigned them to division after an examination of the briefs for that purpose.

D. *Further to avoid considering the corporation's contention and authorities, the opinion misstates the source of the contention that rehearings en banc are needed to cure the divergence of divisions.*

On the source of this contention the court's opinion states, "It has been remarked by *some commentators* that the procedure outlined by Congress for the Courts of Appeals involves a distinct hazard of intracircuit conflicts."

"Some commentators"! To what extent will the court go in order to avoid mentioning that this hazard was stated first by the Third Circuit in the Textile Mills case and on its appeal by the Supreme Court, and later implicitly by the Supreme Court in returning Robinson v. Johnston to this court because of the difference in viewpoint of our divisions. That is to say, in such holdings on the criterion of divergence, the Third Circuit and the Supreme Court are no more than mere commentators.

The opinion seeks to minimize the likelihood of a division overruling sub silentio a prior division's holding and this with the certainty of nine judges and three divisions in the near future.[4] The idea is that the judges in the division so acting, "by *in*formal and unofficial interchanges" with the non-participatig judges, will advise the latter that the decision is at variance with that of a prior division. In my seventeen years on the bench I have had no associate so confess his mistaken act.

An examination of the three cases cited, supra, the Kronberg, Fruehauf Trailer and Northwestern Mutual cases, in which the petitions for rehearing en banc were stricken, shows that two of them were founded on such conflict of

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[4]See footnote 3, supra.

divisions and the third on conflicts in district court decisions on important matters. Also in the seven cases of Bradley Mining Co. v. Boice, 12684; Acheson v. United States, 12772; Independence Lead Mines Co. v. Kingsbury, 11959; Tanimura v. United States, 13014; California v. United States, 12184; Sunbeam Lighting Co. v. Sunbeam Corp., 12357, and Zamlock v. United States, 12753, the division judges refused consideration of the petition addressed to the seven and thus prevented the court en banc from considering the contention in each that the division's decision conflicted with the decision of a prior division.

E. *The court's confessed fear of the burden of an overwhelming volume of such petitions may be avoided by an amendment of its rules.*

Against a flood of such petitions we can protect ourselves, as has the Supreme Court, by amending our Rule 25 as follows:

"Rule 25.
REHEARING

"A petition for rehearing of a decision by a division of the court may be presented within 30 days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

"Where there has been a denial of a rehearing of a decision by a division, a petition for a rehearing in bank may be filed within fifteen days. The petition shall be in the form above described and with the same certificate of counsel. No petition will be entertained, unless one of the judges participating in that decision shall join in seeking such rehearing."

The Supreme Court has similarly protected itself on its petitions for rehearing by a provision in its Rule 33, of which the pertinent portion is:

> "Such a petition . . . will not be granted unless a justice who concurred in the judgment desires it and a majority of the Court so determines."

In the last seven years there have been but 75 dissents, an average of less than 11 per year. Probably less than 11 judges per year would join in petitioning for a rehearing en banc.

In view of our prospective three divisions and the likely need for such rehearings en banc, an average of eleven such petitions would not be an intolerable burden, less than 4% of our submitted cases. It would substantially reduce the likelihood of conflict between the divisions.

By requiring first a rehearing by the division, the district judges would not be barred from the reconsideration of a decision.

The motion to file should have been considered on its merits and granted.

(Endorsed:) Opinion and Dissenting Opinion. Filed Jul. 9, 1952. Paul P. O'Brien, Clerk.

Appendix II

VALUE OF STOCK RECEIVED BY SECURED CREDITORS OF THE DEBTOR UNDER THE REORGANIZATION PLAN

Under the plan of reorganization, the preferred stock was given an assumed value of $100 per share and the common assumed values of $57 and $62 per share. (233 I.C.C. 452)

THE WESTERN PACIFIC RAILROAD COMPANY

Range of Common and Preferred Stock on the New York Stock Exchange

Year	Common High	Common Low	Preferred High	Preferred Low
†1944	31¾	29¾	66½	65
1945	57⅛	30½	92	64¼
1946	56½	27	101	71
1947	42¼	26½	90	65
1948	36½	25½	74½	58¼
1949	30	20	70¼	53¾
1950	55	28	89	64½
1951	58¾	46½	94¼	84¼
*1952	56¾	46½	95	89

†From December 29, 1944.
*To June 30, 1952.

Above quotations from THE COMMERCIAL AND FINANCIAL CHRONICLE, WALL STREET JOURNAL *and* STANDARD CORPORATION RECORDS.

Due service and receipt of a copy of the within is hereby admitted this..............day of July, 1952.

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Attorneys for petitioners The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver

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Attorneys for petitioners Meredith H. Metzger, Henry Offerman and J. S. Farlee & Co., Inc.